IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 8, 2009 Session

ROBERT H. GOODALL, JR. v. WILLIAM B. AKERS

Appeal from the Circuit Court for Sumner County
No. 26169-C Tom E. Gray, Chancellor

No. M2008-01608-COA-R3-CV - Filed March 3, 2009

Buyer sued seller of large tract of real estate for intentional misrepresentation, fraudulent misrepresentation, breach of contract, and breach of express warranty based upon allegations that an earthen dam on the property was unsafe. The trial court granted summary judgment in favor of the buyer on all issues of liability. Because we have concluded that there is a genuine issue of material fact as to whether the buyer reasonably relied upon the seller's misrepresentations, we reverse and remand.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and RICHARD H. DINKINS, J., joined.

George E. Barrett and Laurel A. Johnston, Nashville, Tennessee, for the appellant, William B. Akers.

Barbara J. Perutelli, Nashville, Tennessee, for the appellee, Robert H. Goodall, Jr.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

William B. Akers owned a 716-acre tract of property in Sumner County that included a four or five acre lake. Robert Goodall, a real estate broker and developer, entered into a contract with Akers on November 4, 2003, to purchase the property. On November 8, 2003, Ed Kittrell, a neighbor who helped Akers with the property, told Goodall that the earthen dam built to create the lake had been "condemned" by the Corps of Engineers. Goodall requested and received a property disclosure statement from Akers. On the property disclosure statement, Akers answered "No" to the question, "Have you received notices by governmental or quasi-governmental agency affecting the Property including but not limited to road changes, zoning changes, assessments, etc.?" and to questions regarding earth stability and drainage or flooding problems.

Prior to the closing, Goodall talked to his attorney, Kay Housch, about the information he had learned from Kittrell. Housch contacted Akers' attorney, who reassured Housch and informed her that Akers would put an additional warranty in the contract to address these concerns. In an amendment to the sale contract, Akers added the following warranty: "[T]o Seller's knowledge there have been no problems with the existing dam on the lake on the Property since same was repaired by Seller and since Seller constructed an enlarged spill way years ago."[1] The amendment was dated February 24, 2004.

The closing occurred on March 2, 2004. Goodall thereafter learned of previous communications between Akers and state dam safety officials concerning the condition of the dam.

Prior history of dam safety issues

Documents in the record show the following relevant communications between Akers and the dam safety authorities: In April 1982, the Division of Water Resources of the Tennessee Department of Conservation notified Akers that he was to file a certificate of approval and safety regarding the dam. This letter referenced an October 1981 safety inspection conducted by the state and the Army Corps of Engineers, a copy of which had been sent to Akers; according to the letter, the report outlined "a number of significant safety deficiencies" and recommendations for correction.

In July 1985, Akers received a letter from the Division of Water Management of the Tennessee Department of Health & Environment[2] ("TDHE") attaching a recent safety inspection report and stating that, "[b]ased on the deficiencies found during this inspection, a Certificate of Approval and Safety cannot be issued at this time." The dam was classified as "a small dam with a high potential for downstream hazard." Among the problems cited in the letter was the inspector's finding that the "downstream face of the dam is leaking significantly over an area near to the top of the dam." The letter referenced a recent telephone conversation with Akers in which he was told that the lake should be drained as soon as possible. Within 30 days of receiving the letter, Akers was to consult an engineer concerning the condition of the dam. In a reply letter, Akers informed the TDHE that the level of the lake had been lowered about ten feet and that it was his intention to drain the lake and leave it drained. In October 1985, the TDHE notified Akers that, "[d]ue to the hazard category of your dam and to the signs of instability of the structure itself, the dam cannot be certified for operation even in the drained condition." Akers was directed to contact an engineer to assess the dam and propose actions to rehabilitate it. In January 1986, a letter from the TDHE notified Akers that the lake had been classified as a farm pond and that the TDHE therefore did not intend to regulate it.

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[1] A few years after purchasing the property in the late 1950's, Akers and his brother had the earthen dam built to create the lake. Prior to 1970, the dam washed out and was reconstructed with an enlarged spillway.

[2] It appears that the Department of Health & Environment took over the dam inspection responsibilities previously performed by the Department of Conservation.

In August 1996, an inspector from the Safe Dams Section of the Division of Water Supply of the Tennessee Department of Environment and Conservation[3] ("TDEC") performed a farm pond review and sent Akers a report stating that "the dam is not stable" and suggesting that the lake be drained. Among the problematic conditions cited was seepage around the outlet pipe. The inspector informed Akers that if he wanted to keep the lake "he needed to have a licensed engineer evaluate the conditions of the dam and make recommendations" to Akers. A July 2001 inspection report states that the property was unchanged; Akers advised the inspector that the public was still not allowed on the property.

Lawsuit

Goodall filed the instant lawsuit against Akers on November 1, 2004, alleging causes of action for intentional misrepresentation, fraudulent concealment, breach of contract, and breach of express warranty. The parties deposed one another in October 2005. In February 2006, Akers filed a motion for summary judgment. Goodall filed a motion for partial summary judgment as to liability.

In support of his motion for partial summary judgment, Goodall submitted attorney Housch's affidavit in which she detailed her extensive experience as an attorney practicing for 22 years, primarily in the area of real estate. Housch further described her discussions with Goodall and with Akers' attorney about the condition of the dam. Housch stated that, after receiving the additional assurances from Akers and his attorney, she "saw no reason to check any other records regarding the dam." Housch further stated: "Mr. Akers never advised that he was in possession of any written documentation concerning the dam or from any public agency which regulated it. Both Mr. Goodall and I relied upon the representations of Mr. Akers and those he made through his counsel in proceeding to close the sale of the property."

Deposition testimony

In moving for summary judgment, both parties relied on the depositions of Akers and Goodall. We will summarize their testimony:

Akers testified that he was trained as a civil engineer and had received a master's degree in engineering from M.I.T. in 1948. During his career, he worked mainly in the asphalt business. In addition to the property at issue in this lawsuit, Akers owned another piece of property upon which he and his brother had supervised the construction of two concrete dams.

Akers and his brother bought the property in Sumner County in the late 1950's. At some point, the brother transferred his interest in the property to Akers. A few years after they bought the property, Akers and his brother hired John Parker to construct an earthen dam. According to Akers,

[3]The Tennessee Department of Environment and Conservation took over the dam safety responsibilities previously performed by the TDHE.

Parker did not make the spillway big enough. Prior to 1970, the dam washed out and Akers had Parker rebuild the dam with a much larger spillway. Akers stated that he did not use the property very often. Over the years, he would go there to quail hunt, and he had the lake stocked with fish.

Akers was questioned about the correspondence he received from the dam safety authorities (summarized above). He often did not recall the content of the letters and reports and meetings referenced therein but acknowledged that he received the correspondence and put the reports and letters in a file. Akers stated that he had been advised by the state that they no longer had jurisdiction over a farm pond, "so I was not concerned about the condition of the dam or the condition of the lake."

When asked about the July 1985 letter from the dam safety authorities directing that the lake be drained, Akers stated that he decided not to drain the lake after receiving the subsequent notification that the state had no jurisdiction over a farm pond:

> So I decided that if they had no jurisdiction, there was no way they could force me to drain it. And I saw no reason to drain it, and didn't drain it. And the threat being that they kept making was, you know, something's going to happen, but it never has happened.

Akers later testified that he thought he actually did have the lake drained around the time of the July 1985 correspondence, but that someone had later plugged the drain and he had not drained the lake again after that time. Akers stated that he had never contacted an engineer in response to the October 1985 letter. He again testified that "I was never concerned about the dam."

Akers testified that, at the time he decided to sell the property, he was not using it and had not been to the property in over ten years. Akers learned that Goodall had some concerns about the dam based on a conversation Goodall had with Kittrell, who had a key and let people in to see the property. Akers stated: "I considered [Goodall] had plenty of time to look at the dam and get whoever's opinion he wanted, but in my opinion the dam was there, had been there for – since the '50's. And I did not consider that a problem, though [Goodall] did." Akers further testified:

> A. . . . And I didn't attest to anything about the dam except that I saw no problem with it, and still don't think – it's still there. And all these things they said were going to happen have never happened. And I did ignore them all.
> . . . .
>
> Q. Did you ever offer those [dam safety inspection] records to him to look at?
>
> A. Not that I recall.
>
> Q. Why not?

> A. Well, I – you know, I don't know why I didn't. As I tell you, I wasn't concerned about it. He was concerned. He had plenty of time to look at the dam, have it inspected, do whatever he wanted to do about it. And I felt like that was his business.

As to the additional warranty, Akers stated: "I didn't say anything about the dam's stability or anything else. I just said that I saw – I saw it as no problem. . . . To my knowledge, there was no problem with the dam, something to that effect."

Akers denied making any statement to Goodall that Kittrell may have been motivated by self-interest in telling Goodall that the dam had been condemned.[4]

Goodall testified that he was a certified residential real estate broker, a licensed residential contractor, and a licensed commercial contractor. He was in the business of developing real estate. Goodall described his interests in various real estate development companies. He had sold millions of dollars worth of property over the years. Goodall stated that the Akers property was the largest piece of property he had purchased.

Goodall was instructed to contact Kittrell about seeing the property, and Kittrell showed Goodall the property in August 2003. He testified that he could not remember how many times he saw the property before making an offer but estimated it was more than one and fewer than five times. Goodall made an offer on the property in September 2003. Goodall could not recall how many times he saw the property before entering into the purchase/sale contract on November 4, 2003. He admitted that there was nothing preventing him from seeing the property and the lake.

Goodall testified that he first learned of problems with the lake from Kittrell on November 8, 2003. Kittrell stated that the dam had been "condemned by the Corps of Engineers." Goodall then requested a property disclosure statement from Akers. Goodall stated that he also looked at the dam and the lake, but there was a lot of vegetation that made it difficult for him to evaluate the condition of the dam. He did not have anyone look at the property to determine if there were any problems before the closing.

Prior to the closing, Goodall and his attorney discussed his concerns, and she contacted Akers' attorney to find out more. Goodall was concerned about liability and the value of the property. Akers agreed to provide an additional warranty. Goodall further testified:

> Mr. Kittrell had indicated the Corps of Engineers had condemned the lake. . . . [I]t didn't make sense to me that the Corps of Engineers would have jurisdiction over that because I think of Corps of Engineers as being near larger bodies of water. Mr. Akers' property disclosure statement and subsequent warranty comforted me where I didn't feel it necessary to go further. I was taking Mr. Akers' word and the fact that

[4] Kittrell had been growing tobacco on Akers' land.

> he was backing that up by the property disclosure and the warranty, I [felt] comforted with that.

According to Goodall, at the closing, Akers "indicated that there were no problems with the dam and that . . . Mr. Kittrell didn't know what he was talking about, that Mr. Kittrell kind of had his own agenda for telling us that." When arriving back in Gallatin from the closing in Nashville, Goodall received a call from the son of one of Akers' downstream neighbors who was concerned about the safety of the dam and had contacted the state to investigate. Goodall then contacted the dam safety authorities and met with a representative on the property. He obtained copies of all of the relevant documents from the state's files.

When asked if he made any independent investigation based on what he observed about the dam prior to closing, Goodall testified that he "relied on Mr. Akers' representations and his assurances." He later stated, "I trusted Mr. Akers that there were no problems with the dam."

Disposition in trial court

A hearing was held on June 23, 2006, on the competing summary judgment motions. The trial court denied Akers' motion for summary judgment and granted Goodall's motion for partial summary judgment. In making this determination, the trial court made a number of factual findings, including the following:

> -Mr. Goodall looked at the property and the Court finds from the record that he was given access to the property. He wasn't restricted in his access.
>
> -[Mr. Akers] warranted to Defendant Akers' knowledge there had been no problems to the existing dam on the lake since the dam had been repaired after 1975. Mr. Goodall did not secure an engineer or have anyone inspect the property . . . .
>
> -The Court makes a finding that [Mr. Akers' additional warranty] is a misrepresentation, that seller – that saying to seller's knowledge. Seller had knowledge because he had problems and he started receiving those by the record April the 8th, 1982. . . . So the dam was leaking. He knew that.[5]

Goodall filed a motion to clarify, and the trial court entered an order on September 18, 2006, stating that the court had disposed of all issues of liability, including the issue of reasonable reliance, in favor of Goodall. After a damages hearing on February 22, 2008, the trial court entered an order on June 19, 2008, awarding Goodall damages in the amount of $250,000 as well as $39,110 in attorney fees.

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[5] For purposes of this appeal, Akers does not dispute the trial court's finding that the representations made by Akers in his additional warranty were misrepresentations because Akers did have knowledge of problems with the dam.

STANDARD OF REVIEW

Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). In reviewing a summary judgment, this court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50 (Tenn. 1997). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we must determine whether factual disputes exist. If a factual dispute exists, we must determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993); *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998). The moving party must negate an element of the opposing party's claim or "show that the nonmoving party cannot prove an essential element of the claim at trial." *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 9 (Tenn. 2008).

ANALYSIS

On appeal, Akers makes two main arguments: (1) that the trial court erred in granting summary judgment in favor of Goodall on the issue of reasonable reliance; and (2) that Goodall could not prevail on a claim of fraudulent concealment because Akers had no duty to disclose the information.

Goodall's complaint alleges that "the Defendant's action both in making misrepresentations and breaching his duty to disclose were intentional, willful and fraudulent." Thus, Goodall asserts causes of action for intentional misrepresentation, based upon Akers' representations, and for fraudulent concealment, based upon Akers' failure to inform Goodall about the history of communications with the dam safety authorities. The elements of a claim for intentional or fraudulent misrepresentation are as follows:

> 1) the defendant made a representation of an existing or past fact; 2) the representation was false when made; 3) the representation was in regard to a material fact; 4) the false representation was made either knowingly or without belief in its truth or recklessly; 5) plaintiff reasonably relied on the misrepresented material fact; 6) plaintiff suffered damage as a result of the misrepresentation.

Walker v. Sunrise Pontiac-GMC Truck, Inc., 249 S.W.3d 301, 311 (Tenn. 2008). A cause of action for fraudulent concealment arises "when a party who has a duty to disclose a known fact or condition fails to do so, and another party reasonably relies upon the resulting misrepresentation, thereby suffering injury." *Chrisman v. Hill Home Dev., Inc.*, 978 S.W.2d 535, 538-39 (Tenn. 1998); *see also Simmons v. Evans*, 206 S.W.2d 295, 296 (Tenn. 1947).

(1)

Akers argues that the trial court erred in granting summary judgment in Goodall's favor and that the undisputed facts warrant summary judgment in favor of Akers. In the alternative, Akers asserts that summary judgment in Goodall's favor was improper because there existed a dispute of material fact as to whether Goodall's reliance upon the alleged misrepresentations was reasonable or justifiable.

Justifiable reliance is an essential element of a claim for fraudulent misrepresentation or fraudulent concealment. *See McNeil v. Nofal*, 185 S.W.3d 402, 408 (Tenn. Ct. App. 2005). The burden of proof is on the plaintiff to show that his reliance upon the defendant's statements or representations was reasonable. *Id.* at 409; *Metro. Gov't of Nashville & Davidson County v. McKinney*, 852 S.W.2d 233, 238 (Tenn. Ct. App. 1992). Whether the plaintiff's reliance on a representation was reasonable is a question of fact that is generally not appropriate for summary judgment. *City State Bank v. Dean Witter Reynolds, Inc.*, 948 S.W.2d 729, 737 (Tenn. Ct. App. 1996).

In determining the reasonableness of a plaintiff's reliance, a number of factors should be considered:

> (1) the plaintiff's business expertise and sophistication; (2) the existence of a longstanding business or personal relationship between the parties; (3) the availability of the relevant information; (4) the existence of a fiduciary relationship; (5) the concealment of the fraud; (6) the opportunity to discover the fraud; (7) which party initiated the transaction; and (8) the specificity of the misrepresentation.

Pitz v. Woodruff, M2003-01849-COA-R3-CV, 2004 WL 2951979, *10 (Tenn. Ct. App. Dec. 17, 2004); *see also Allied Sound, Inc. v. Neely*, 58 S.W.3d 119, 122 (Tenn. Ct. App. 2001). Akers focuses his argument on the first, third, and sixth factors–Goodall's business experience, the availability of information about the dam, and the opportunity to discover the alleged fraud. Akers argues that Goodall's experience in the business of real estate development, his knowledge of possible problems with the dam, and his failure to further investigate made his reliance on Akers' representations concerning the condition of the dam unreasonable.

Previous cases dealing with the issue of reasonable reliance have cited the following guiding principles:

> [W]here the means of information are at hand and equally accessible to both parties so that, with ordinary prudence or diligence, they might rely on their own judgment, generally they must be presumed to have done so, or, if they have not informed themselves, they must abide the consequences of their own inattention and carelessness. Unless the representations are such as are calculated to lull the suspicions of a careful man into a complete reliance thereon, it is commonly held, in

> the absence of special circumstances, that, where the means of knowledge are readily available, and the vendor or purchaser, as the case may be, has the opportunity by investigation or inspection to discover the truth with respect to matters concealed or misrepresented, without prevention or hindrance by the other party, of which opportunity he is or should be aware, and where he nevertheless fails to exercise that opportunity and to discover the truth, he cannot thereafter assail the validity of the contract for fraud, misrepresentation or concealment with respect to matters which should have been ascertained, particularly where the sources of information are furnished and attention directed to them, as, for example, where the source of accurate information is indicated or referred to in the contract.

McNeil, 185 S.W.3d at 409-10 (quoting 91 C.J.S. *Vendor & Purchaser* § 68); *see also Pakrul v. Barnes*, 631 S.W.2d 436, 438 (Tenn. Ct. App. 1981). It has also been stated as a general rule that "a party dealing on equal terms with another is not justified in relying upon representations where the means of knowledge are readily within his reach." *Solomon v. First Am. Nat'l Bank*, 774 S.W.2d 935, 943 (Tenn. Ct. App. 1989); *see also McKinney*, 852 S.W.2d at 239.

To support the trial court's grant of summary judgment in his favor, Goodall cites Housch's affidavit, in which she reviewed her communications with Goodall, Akers, and Akers' attorney and gave her professional opinion: "Based upon the assurances from Mr. Akers and his attorney, I saw no reason to check any other records regarding the dam." We do not consider this affidavit alone sufficient to establish as a matter of law that Goodall's reliance was reasonable. Goodall has the burden of proof on the issue of reasonable reliance and must allege undisputed facts establishing the existence of reasonable reliance in order to shift the burden of production . *See Hannan*, 270 S.W.3d at 9 n.6. Part of the factual underpinning of Housch's affidavit is her statement that Akers "implied that there was no truth to Mr. Kittrell's allegations regarding the dam and that Mr. Kittrell had an ulterior motive in reporting such information." Akers denies making such a statement or implication.

Viewing the evidence in the light most favorable to Akers, we cannot conclude that Goodall's reliance was reasonable or justifiable as a matter of law. Rather, the reasonableness of Goodall's reliance is a factual determination not appropriate for resolution at the summary judgment stage. A fact-finder must "take into account the specific situation of a plaintiff in evaluating the reasonableness of reliance." *City State Bank*, 948 S.W.2d at 737. On remand, the trier of fact will have to consider whether, in light of Goodall's level of expertise in the real estate business, it was reasonable for him to place all of his trust in Akers' statements and make no effort to further evaluate the safety of the dam after having been alerted by Kittrell to possible problems. Was it reasonable, under the circumstances, for Goodall to forego any independent inspection or investigation concerning the dam? This determination will hinge in part on the trial court's assessment of the credibility of the two parties, as well as any other witnesses. Weighing facts and assessing credibility are not appropriate for the summary judgment process. *See Byrd*, 847 S.W.2d at 216.

The trial court erred in granting partial summary judgment in favor of Goodall because reasonable reliance cannot be found in this case as a matter of law.

(2)

With respect to the fraudulent concealment claim, Akers argues that there was no duty to disclose and, therefore, no cause of action.

Tennessee courts have identified three categories of cases in which a duty to disclose arises: 1) where there is a definite fiduciary relationship between the parties, 2) where "it appears one or each of the parties to the contract expressly reposes a trust and confidence in the other," and 3) where "the contract or transaction is intrinsically fiduciary and calls for perfect good faith." *Macon County Livestock Mkt., Inc. v. Ky. State Bank, Inc.*, 724 S.W.2d 343, 349 (Tenn. Ct. App. 1986) (citing *Domestic Sewing Mach. Co. v. Jackson*, 83 Tenn. 418, 425 (Tenn. 1885)). In a case involving the sale of real property, our Supreme Court held that the seller had a duty to disclose "'all he may know respecting the subject matter materially affecting a correct view of it, unless common observation would have furnished the information.'" *Simmons*, 206 S.W.2d at 296 (quoting *Perkins v. McGavock*, 3 Tenn. (Cooke) 415, 417 (1813)). Thus, a seller of real estate had a duty to disclose "material facts affecting the property's value known to the seller but not reasonably known to or discoverable by the buyer." *Justice v. Anderson County*, 955 S.W.2d 613, 617 (Tenn. Ct. App. 1997).

Applying these principles to the present case, we conclude that the existence of a duty on the part of Akers to tell Goodall about his prior dealings with the dam safety authorities hinges upon whether, under the particular circumstances of this case, the "exercise of ordinary diligence" required Goodall to investigate the condition of the dam further. *Simmons*, 206 S.W.2d at 296. For the reasons discussed above with respect to reasonable reliance, it was improper for the trial court to make that determination at the summary judgment stage in this case.[6]

The decision of the trial court is reversed and the case remanded for further proceedings consistent with this opinion. Costs of appeal are assessed against the appellee.

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ANDY D. BENNETT, JUDGE

[6] Several of the Tennessee cases on fraudulent concealment cite with approval § 551(1) of the RESTATEMENT (SECOND) OF TORTS (1976). *See Patel v. Bayliff*, 121 S.W.3d 347, 353 (Tenn. Ct. App. 2003); *Ky. State Bank*, 724 S.W.2d at 349. We note that § 551(2) states that a party has a duty to disclose "matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading." RESTATEMENT (SECOND) OF TORTS § 551(2)(b). In *Westmoreland v. Tolbert*, this court noted, as an exception to the rule of *caveat emptor*, that "a seller who makes a representation concerning the condition of an improvement to real property must disclose enough to prevent the disclosure from becoming misleading." *Westmoreland*, 1990 WL 48464, at *3 (Tenn. Ct. App. Apr. 11, 1990) (citing *Akbari v. Horn*, 641 S.W.2d 506, 508 (Tenn. Ct. App. 1982)).